IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

2432

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

EDWARD J. CANNON,
EMERSON HADLEY,
Attorneys for Plaintiff in Error.

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STATEMENT OF THE CASE.

Action was brought by the government, plaintiff below, against the Railway Company, defendant below, to recover penalties alleging violation of the Hours of Service Act of March 4, 1907 (34 Statutes 415). The charge of violation grew out of the following admitted facts:

The train crew were called to leave Tacoma in an easterly direction at 6:00 A. M. The rules of the Company require that certain of the train crew report one hour before time for the train to leave. On this occasion there was a delay of forty-five minutes on account of derailment of yard cut at starting point and the train reached the Auburn terminals, eighteen miles away, at eight o'clock and twenty-five minutes, the men having put in an hour and a half actual work. At Auburn it was discovered that Nos. 603, 41 and 257, superior trains, must be met upon the road if the train proceeded, and No. 4 must be allowed to pass, and in view of these conditions, the train crew was released at the Auburn terminals for the full definite period of one hour and a half and the train was placed in charge of an engine foreman or watchman.

Considering as time in actual service the hour before the train was scheduled to leave, and the forty-five minutes waiting because of the mishap before the train started, and the hour and a half the time the crew was laid off at Auburn, and, considering also the time spent at meals and the time necessary to report in at Cle Elum (the destination), after the train was cared for, the train crew consumed more time than sixteen hours. If we deduct the time the crew was laid off at Auburn, the sixteen-hour period was not exceeded.

Upon the admission of these facts the defendant, plaintiff in error here, challenged the sufficiency of the evidence to support a judgment in favor of the plaintiff, defendant in error here, and moved the court to dismiss the action (Transcript of Record, page 31). The motion was denied, argument was had and later judgment in the sum of $600.00 and costs entered against plaintiff in error and this writ sued out.

ASSIGNMENTS OF ERROR.

The appellant specifies the following particulars in which it believes and avers that the court erred in rendering the judgment complained of:

I.

The court erred in holding and deciding that releasing the train crew for a definite period of one hour and thirty minutes at its Auburn terminals did not break the continuity of the service.

II.

The court erred in including in the hours of service the hour and thirty minute period during which the train crew in question was let off and released from duty.

III.

The court erred in holding and deciding that under the admitted facts the defendant (plaintiff in error here) had violated the act known as the Hours of Service Act (34 Statutes 415).

IV.

The court erred in holding and deciding that the defendant (plaintiff in error here) was guilty on each count or cause of action or either or any of them.

V.

The court erred in imposing a penalty of $100.00

and costs for each alleged violation or for either or any of them.

VI.

The court erred in denying defendant's (plaintiff in error here) challenge to the sufficiency of the evidence to support the judgment made at the close of the case, and in refusing to dismiss the action for the reason that under the admitted facts it appears that the defendant (plaintiff in error here) was not guilty of a violation of the aforesaid act upon any of the counts or causes of action.

The defendant took timely exceptions to each of the errors complained of.

ARGUMENT.

It is admitted that the engineer and fireman went on duty at five-thirty o'clock in the morning and went off duty at eleven o'clock in the evening of the same day, that the conductor and brakeman went on duty at five o'clock in the morning and went off duty at ten-thirty in the evening.

The government has stipulated, as a *fact* in this case, that all these employes went *"off duty"* at Auburn at 8:25 A. M. and "returned to duty" at

10 A. M. (See Stipulation, pages 13 and 14, Transcript.)

The trial court, in its opinion on page sixteen of Transcript, says regarding this time from 8:25 to 10 A. M., "*during* this period of one hour and thirty minutes the train was placed in charge of an engine foreman or watchman at Auburn and the train crew *laid off or released from duty.*"

The decision of this case depends upon whether or not these employes were "on duty" between 8:25 A. M. and 10 A. M.

The statute so far as applicable to this case reads as follows:

> "That it shall not be lawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or

> again go on duty without having had at least eight consecutive hours off duty."

If the employees in this case were not *on duty* from 8:25 A. M. to 10 A. M., it seems to be beyond question that they were not "on duty for a longer period than sixteen consecutive hours,"—and also that they had not "been continuously on duty for sixteen hours," and it does not appear that any of them had "been on duty sixteen hours in the aggregate in any twenty-four hour period."

Were these employees *"on duty"* between 8:25 A. M. and 10 A. M.? Apparently the question is answered by the formal written stipulation signed by the two United States Attorneys in charge of this case. Their stipulation is that these men *"went off duty temporarily at Auburn, in the State of Washington, at* 8:25 *A. M. and returned to duty at* 10:00 *A. M. on said date at said Auburn."* If they *"went off duty" at one time and "returned to duty"* at another, it follows they were not on duty in meantime.

But notwithstanding this stipulation, the court has held that these men were *on duty* continuously from the time they went to work in the morning until they stopped at night,—and seems to place

its decision that these men were on duty during this period from 8:25 A. M. to 10 A. M. on these grounds,—

First, that the period of sixteen hours' labor allowed by the statute cannot be broken into two or more periods of labor aggregating sixteen hours.

Second, that the period of one hour and a half for rest is so short a time, that it is no benefit to the employee, and therefore, cannot be excluded in computing the hours of service.

Third, that case is controlled by *M. K. & T. Ry. Co. vs. U. S.,* 23 U. S., 112.

Upon the first point, the court says:

> "The hours of service of railway trainmen are long at best, leaving only eight hours for rest and recreation, and if this brief period can be broken into fragments, the purpose and policy of the law will be entirely frustrated."

It would seem from this that the trial court was of the opinion that period of labor must be computed continuously from the time it commences and that the time of rest must also be a continuous period. It is possible that this might have

been a wise provision, but it is also certain that Congress, when it passed the law in question, did not consider such a requirement necessary, for the statute clearly contemplates that the sixteen hours of service in the twenty-four, may be made up of more than one period. It provides that if an employee is on duty continuously for sixteen hours, he shall not be permitted again to go on duty until he has had at least *ten consecutive* hours off duty and also provides that where the employee has been on duty *sixteen hours in the aggregate,* in any twenty-four hour period, he shall not be required or permitted to again go on duty, until he has had at least *eight* consecutive hours off duty.

The term *sixteen hours in the aggregate,* in this statute, must mean sixteen hours where the service is not continuous, but is broken into more than one period, for if *sixteen hours in the aggregate,* means the same thing as sixteen continuous hours, then this provision contradicts and nullifies the preceding clause, which provides for ten hours rest after sixteen hours continuous service. Moreover, this is a question that is no longer an open one, for the Supreme Court has already decided that the hours of service allowed under this

statute may be in two or more periods. *U. S. v. Atchison, Topeka and Santa Fe Railway*, 220 U. S., 37. The court held in this case that the nine hours of service allowed a telegraph operator was not required to be a continuous period, but could be made up of two periods of work aggregating nine hours, separated by a period of three hours rest. The court says regarding this language of the statute:

> "The alternative reference in §2 to 'sixteen consecutive hours' and 'sixteen hours in the aggregate' shows that the obvious possibility of two periods of service in the same twenty-four hours was before the mind of Congress and there was no oversight in the choice of words."

In this case the court further says in answer to a suggestion from the government, that a man might be set to work two hours on and two hours off alternatively. "This hardly is a practical suggestion." This answers the similar suggestion made in the opinion of the trial court in this case. Congress doubtless had in mind, when this law was passed, that there was no disposition on the part of railroad companies to make the work of their employees uselessly severe. It is almost impossible to imagine any circumstances in railroad

operations, under which it would be to the advantage of either the company or the employees that the latter should work and rest for very short periods alternatively and it was not necessary that any such contingency should be provided against.

Second. The court further places its decision on the ground that an hour and a half is so short a period of rest that it should not be taken into account and, therefore, the court was at liberty to hold that the service of the employees was continuous from the time they commenced work in the morning, until they quit at night. We think this conclusion of the court is not supported by the general experience of men. An absolute rest of an hour and a half, when a man is entirely relieved from all duty and all responsibility, is generally recognized to be of great benefit to a man who is working long hours. Take for example, the engineer of a train. Suppose he has been steadily running an engine for several hours. Can anyone say that an absolute rest of an hour and a half is of no benefit, or that because the time is so short it is of no consequence? Is the ordinary nooning of a laboring man of one hour so short a time that the period of rest is no benefit to him and, therefore, of no consequence? Would

the laborer so regard it if the hour was taken away from him and he was required to work during that hour? If the hour and a half is so short that as a rest period it is inconsequential, it ought to follow that the addition of one hour and a half to the sixteen hours of labor allowed is also so short as to amount to nothing, but we apprehend no one will be found to make that claim. Take the case of a telegraph operator employed in a day and night office. This same statute provides he cannot be permitted to work more than nine hours in twenty-four. Suppose he worked from 6:00 A. M. till 12 o'clock noon, was off duty until one-thirty P. M. and then worked from one-thirty P. M. until four-thirty o'clock P. M. Would a court be justified in holding on that state of facts that the operator was on duty ten hours and a half,—that his service was continuous and in violation of the statute? The Supreme Court has said in the *Atchison* case that if such an operator worked from six-thirty A. M. to twelve and from three P. M. to six-thirty P. M., there was no violation of the statute. What is there in the statute that permits the court to say that in computing the hours of service under the statute a rest of three hours at noon

can be excluded and a rest of an hour and a half cannot?

But it may be claimed that there is a distinction to be drawn between the case of a telegraph operator who only works nine hours and that of a trainman who may work sixteen. If any such distinction is drawn, where would the telegraph operator in a day station come? He is permitted to work thirteen hours. Suppose he goes on duty at 5:30 A. M. and stays on duty till 12 o'clock noon,—is off duty from 12 o'clock noon until 1 o'clock P. M. and then is on duty from 1 P. M. to 7:30 P. M. Has he been on duty thirteen hours or fourteen hours? Would the court hold that he was on duty continuously from 5:30 A. M. until 7:30 P. M.,—that the hour's rest at noon was of such trifling importance that it should be disregarded in computing the hours of service? Would the operator say, if he had a contract allowing him an hour off duty at noon, that the hour off at noon was of no consequence and no benefit, or would he say that it was a great relief to him to be entirely without responsibility for an hour each day? There is no half-way ground if a rest of an hour or an hour and a half is of enough consequence to be taken into

consideration, in computing the hours of service, in the case of a telegraph operator. Then it is also of enough consequence to be taken into account in the case of trainmen. Indeed a rest of an hour and a half is of more importance to the trainman, for the reason that they may be required to work a longer time on a stretch and therefore need the rest more than the man whose hours are shorter.

Third. Is the decision of this case controlled by the decision of the Supreme Court in *M. K. & T. Co. vs. U. S.* 231, U. S. 112? The opinion of Mr. Justice Holmes in that case in so far as it relates to this matter is as follows:

> "One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait. *United States v. Chicago, M. & P. S. Ry. Co.,* 197 Fed. Rep. 624, 628; *United States v. Denver & R. G. R. Co.,* 197 Fed. Rep. 629."

The ground on which the time this crew was waiting for their engine was held to be a part of their time *on duty,* was that they were *under orders liable to be called upon at any moment and were not at liberty to go away.* This was not the condition of the employees in the present case. They were *not* under orders. They were *not* liable to be called at any moment, but on the contrary, they had been released for a definite period of one hour and a half. They *were* at liberty to go away if they wished. They were at a terminal of the Railway Company and could have gone off and slept, or used the time in any way they wished. The natural inference to be drawn from this decision of the Supreme Court is that the employees in this case were not on duty during the hour and a half they were released at Auburn,—for all of the conditions which the court points to a showing that the men, in that case, were on duty are exactly reversed in this case.

The trial court seems to be of the opinion that because the Supreme Court cited the opinion of the District Court in *U. S. v. C., M. & P. S. Ry.,* 197 Fed. 624, therefore it signified its approval of every proposition decided in that case. We think that this is giving too broad a significance

to the citation in question. The citation of the case doubtless does signify the approval of the case so far as it relates to the proposition of law under which it was cited. The court cited this case as sustaining its ruling that an employee that was under orders liable to be called upon to work at any moment and who was not at liberty to leave his train was *on* duty. We do not think that it can fairly be said that the court thereby approved a ruling that an employee absolutely released from all duty and responsibility for an hour was still *on* duty. That was a question the court did not have under consideration.

The trial court further suggests that while in extreme cases the court may declare, as a matter of law, that a given period is so short as not to break the continuity of the service, or that another period is so long as to break the continuity of the service, that between these two extremes there is a "twilight zone where the question becomes a mixed one of law and fact," and that since in this case a jury had been waived, therefore the court was justified in finding as a fact that the employees in this case were not *off duty* for the hour and a half during which they were released at Auburn. As has been said before the

government has stipulated as a fact, in this case, that these men went *off duty* at 8:25 A. M. and returned to duty at 10 A. M.

We do not see how in the face of this stipulation even a jury would be allowed to find that they did not go off duty, but were on duty all the time. The reason the court gives is that the time was so short that the rest was of no benefit to the employees. While it is possible that insignificant periods of rest might be disregarded in computing hours of service, we submit for the reasons already stated an hour and a half is such a substantial rest that a jury would not be allowed to find that a man who had an absolute rest for that time had been working all the time and any verdict based upon such a finding would be set aside.

It may throw some light upon the subject to consider how the ruling of the court in this case, will work out in actual practice. Most of the divisions of railroads are about one hundred miles long. A fast freight train will make the run over the division in about six to eight hours. It is not uncommon for a train crew to double back the same day; that is, take a train over the divi-

sion and then after a short interval go back to the starting point. It is, of course, important to the Company and the crew to know how long a time they can be on the road going back without exceeding the sixteen hours permitted by statute.

We understand it is conceded that if for example, a crew starts in the morning and consumes eight hours in getting to the end of the division and then after an interval of three hours starts back, they can run full eight hours before they are compelled to tie up and rest, to avoid violating the hours of service law, but if they start back on the return trip, after staying at the terminal only an hour and a half, according to the decision of the trial court, no one can tell when the sixteen hours service will expire. It may expire in six and a half hours after they start back and it may not expire until eight hours after they start back, because there is no way to tell whether the crew were on duty the hour and a half they laid over at the terminal except to submit the question to a jury and, of course, one jury might decide one way and another the other way on the same evidence, and the Company might incur penalties amounting to two or three thousand dollars.

It may be answered that the Railway Company can be on the safe side by stopping the crew when they have been out six hours and a half. But how would it be if the lay-over had been two or two and a half hours? It is still a question of fact for a jury to say whether the men were *on duty* when they were laying off. In such a case are we still within the limits of that "twilight zone," where it is so dark that only a jury can tell what is legal and what is illegal. If this is the law, it is certainly unfortunate that a penal statute apparently quite plain on its face should be rendered so uncertain by judicial interpretation.

We submit that the principles of law applicable to this case have been decided by the Supreme Court in the cases of *U. S. vs. Atchison, Topeka & Santa Fe Ry., supra,* and *Missouri, Kansas & Texas Ry. vs. U. S., supra,* and that the judgment of the lower court should be reversed.

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